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No. 94-1240

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN W. WHITTLESEY, PETITIONER

v.

OFFICE OF HEARINGS AND APPEALS,
SOCIAL SECURITY ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's removal from his position as an Administrative Law Judge for misconduct, including the practice of law without agency approval, violated the First Amendment.

2. Whether petitioner's removal violated the Fair Labor Standards Act.

3. Whether petitioner received an impartial hearing before the Merit System Protection Board.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A43-A44) is unpublished, but the decision is noted at 39 F.3d 1197 (Table). The final decision of the Merit Systems Protection Board (MSPB) (Pet. App. A1-A20) is reported at 59 M.S.P.R. 684.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1994. The petition for a writ of certiorari was filed on January 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August, 1990, petitioner was appointed an Administrative Law Judge (ALJ) for the Office of Hearings and Appeals of the Social Security Administration (SSA) and was assigned to the Hearings Office in White Plains, New York. Pet. 1; Pet. App. A2. On April 10, 1991, the SSA filed a complaint with the MSPB in which it proposed to remove petitioner on the grounds that he had engaged in the private practice of law from approximately November, 1990, through at least February 22, 1991, without the agency's approval and in violation of the agency's regulations pertaining to outside activities. *Id.* at A24-A25; Gov't C.A. Br. 5. In May, 1991, petitioner voluntarily entered into a settlement agreement in which he agreed to undergo a 30-day suspension and promised "[n]ot to engage in the practice of law except as required by his official duties." *Id.* at A25.

2. On November 10, 1992, the SSA filed a complaint with the MSPB proposing to remove petitioner upon four separate grounds of misconduct. Pet. App. A21-A32. In Charge One, petitioner was charged with engaging in the outside practice of law without the agency's approval and in violation of pertinent agency regulations. *Id.* at A22-A24. In Charge Two, petitioner was charged with violating the terms of the May, 1991, settlement agreement. *Id.* at A24-A26. In Charge Three, petitioner was charged with failing to abide by agency time and leave requirements. *Id.* at A26-A30. In Charge Four, petitioner was charged with misusing agency resources and personnel in furtherance of private legal matters unrelated to his official government duties. *Id.* at A30-A32.

The ALJ issued an initial decision on March 9, 1993, in which he sustained each of the four charges in whole or in part, and recommended that the agency be authorized to remove petitioner from his position. Pet. App. A3. Petitioner submitted exceptions to the initial decision to the MSPB. On December 7, 1993, the MSPB issued its final decision, in which it adopted the initial decision, with modifications. *Id.* at A1-A20. The Board sustained Charges One, Two and Three, and found petitioner's misconduct sufficient to authorize the agency to remove him from his position as an ALJ. *Id.* at A9-A11, A17.

With regard to Charge One, the MSPB found that on two occasions in September, 1992, petitioner appeared on behalf of clients before the New York State Workers' Compensation Board and that petitioner was representing a third client in a wrongful termination action. Pet. App. A6-A9. Rejecting petitioner's challenge to the introduction of certain evidence in support of this charge, the MSPB concluded that "the three sustained specifications are sufficient to establish [petitioner's] unapproved practice of law as alleged in Charge I." *Id.* at A9.

The MSPB sustained the allegation in Charge Two that petitioner had practiced law in violation of the May, 1991, settlement agreement. Pet. App. A9-A10. The Board found that SSA had presented credible testimony that petitioner had admitted to the Regional Chief ALJ that he was representing clients and found no basis to challenge the ALJ's credibility determinations in the initial decision. *Ibid.* In regard to Charge Three, the MSPB rejected petitioner's charge that the agency had failed to meet its burden of proof to show that he was not conducting agency business during his absences from the office, finding the SSA had demonstrated nine

instances of unauthorized absence from duty and falsification of the attendance register. *Id.* at A10-A11.[1]

Finally, the MSPB rejected petitioner's affirmative defenses, including petitioner's charge that the agency's prohibition of the practice of law without agency approval violates his First Amendment rights (Pet. App. A12-A13), that the ALJ erred in not excluding certain evidence in violation of his constitutional right to privacy (*id.* at A13-A15), and that the initial decision was the product of bias and prejudice against him (*id.* at A16). Noting that "[t]his proceeding is the second disciplinary action against the [petitioner] for unauthorized practice of law in two years," that petitioner had "broken [his] promise" not to practice law while an ALJ, and that petitioner "has shown a lack of integrity by falsifying time and attendance records," the MSPB found that "the agency has shown good cause to take the proposed action, and we hereby authorize the agency to remove the [petitioner]." *Id.* at A17.

3. The Federal Circuit summarily affirmed. Pet. App. A43-A44.

ARGUMENT

Disciplinary actions against administrative law judges are governed by 5 U.S.C. 7521(a), which provides:

> An action may be taken against an administrative law judge * * * by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

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[1] The MSPB did not sustain Charge Four, finding the agency's evidence insufficient to prove the charge of misuse of agency resources and personnel. Pet. App. A11.

In the instant action, the MSPB correctly found that petitioner's misconduct, established by unrebutted evidence, demonstrated "good cause" for petitioner's removal.[2]

1. Petitioner does not dispute that he engaged in the practice of law without agency approval, but argues (Pet. 4-9) that the SSA's prohibition of such practice violates the First Amendment. Petitioner's claim is without merit.

Federal regulations prohibit outside employment incompatible with the full and proper discharge of the duties of government employment. See, *e.g.*, 45 C.F.R. 73.735-701, 73.735-704. The SSA has supplemented these regulations in the SSA Guide on Employee Conduct, which specifically prohibits ALJs from engaging in any outside legal activities involving the representation of clients. Pet. 2-3. In this respect, the SSA has done nothing more than adopt the generally accepted rule that, except when he or she is acting pro se or advising family members without compensation, "[a] judge shall not practice law." Model Code of Judicial Conduct, Canon 4(G) (1990); accord Model Code of Judicial Conduct for Federal Administrative Law Judges, Canon 5(F) (Nat'l Conf. of Admin. Law Judges et al. 1989); cf. 28

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[2] Good cause to discipline an ALJ has been found for a variety of types of misconduct. See, *e.g.*, *Social Security Administration* v. *Burris*, 39 M.S.P.R. 51 (1988), aff'd mem., 878 F.2d 1445 (Fed. Cir.), cert. denied, 493 U.S. 855 (1989) (insubordination); *Social Security Administration* v. *Carter*, 35 M.S.P.R. 466 (1985), modified, 35 M.S.P.R. 485 (1987), aff'd mem., 856 F.2d 202 (Fed. Cir. 1988) (sexual harassment); *Social Security Administration* v. *Givens*, 27 M.S.P.R. 360 (1985) (use of government-owned motor vehicle for other than official purposes); *Social Security Administration* v. *Pucci*, 27 M.S.P.R. 358 (1985) (abuse of position; unauthorized outside activity).

U.S.C. 454 ("Any justice or judge appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor.").

Limiting petitioner's opportunity to moonlight as a lawyer is a conduct-based restriction reasonably related to avoiding an appearance of impropriety or conflict of interest. "[T]he Constitution does not create a right to moonlighting; public agencies may insist on the full-time services of their employees." *Walsh* v. *Ward*, 991 F.2d 1344, 1345 (7th Cir. 1993). While petitioner is correct (Pet. 4) that the practice of law requires speaking and writing, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part * * * carried out by means of language, either spoken, written, or printed." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); see *City of Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989).[3]

2. Petitioner next contends (Pet. 9-12, 13-14) that because he was a "professional" employee exempted from

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[3] Even if the SSA's prohibition were to be reviewed under a First Amendment standard, it would clearly pass muster. As the Court noted in *United States* v. *National Treasury Employees Union*, No. 93-1170 (Feb. 22, 1995), slip op. 23, the government may prohibit employees from receiving compensation for speech if there is a nexus between the employee's job and the subject matter of the expression. "[O]perational efficiency is undoubtedly a vital governmental interest," *id.* at 18, and such efficiency is endangered when a purportedly neutral adjudicator in one government benefits system becomes an advocate in another.

In addition, petitioner entered into a settlement agreement promising, on penalty of disciplinary action, that he would not engage in the practice of law outside of work, Pet. App. A25, and the MSPB found that petitioner's broken promise combined with his falsification of attendance records were sufficient to warrant his removal, *id.* at A17.

the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. 207(a), 213(a)(1), he cannot be disciplined for failing to work a forty-hour week. This contention is without merit. Federal law expressly provides that "[t]he head of each Executive agency * * * shall * * * establish a basic administrative workweek of 40 hours for each full-time employee in his organization." 5 U.S.C. 6101(a)(2); see 5 C.F.R. 610.111(a)(1). Petitioner, a full-time employee, was therefore obligated to work forty hours a week. Moreover, the petitioner was found to have falsified attendance records, reporting that he came in earlier and left later than he in fact did. Pet. App. A10, A28-A30. Petitioner's deliberate falsehoods to his employer constituted independent grounds for disciplinary action. See, *e.g.*, *Quinton* v. *Department of Transportation*, 808 F.2d 826, 828-829 (Fed. Cir. 1986).

3. Petitioner finally contends (Pet. 12-16) that he was denied a fair hearing by the MSPB due to a series of alleged errors. First petitioner claims (Pet. 12-13) that the MSPB erred in considering a letter delivered to petitioner's SSA office from a client because the Regional Chief ALJ, who was handed the letter by the client (Pet. App. A14 n.8), violated the American Bar Association's Code of Ethics by reading the letter.[4] As the MSPB noted in response to the same argument below (Pet. App. A14), petitioner's contention that the letter was protected by attorney-client privilege is sufficient in itself to support the SSA's charge of unapproved practice of law. Cf. *In re Grand Jury Empanelled February 14, 1978*, 603 F.2d 469, 474-475 (3d Cir. 1979). In addition, even if the letter were obtained in violation of the Code of

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[4] Petitioner also asserts (Pet. 13) that there was a Fourth Amendment violation, but aside from reproducing the text of the Amendment, he does not explain this claim.

Ethics, it does not necessarily follow that it should have been excluded from the proceeding in this case. Cf. *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1049 (1984) (exclusionary rule does not normally apply in civil proceedings); *Delk* v. *Department of the Interior*, 57 M.S.P.R. 528, 530 (1993) (exclusionary rule does not apply to MSPB proceedings).

Petitioner also contends (Pet. 14-15) that Charge Two, alleging that petitioner violated the terms of the May, 1991, settlement agreement, failed to comply with the "particularity" requirement of 5 C.F.R. 1201.133, because it did not detail the instances of practice of law that violated the terms of the agreement. However, as the MSPB correctly observed, petitioner's argument is based on "the fallacious premise that each paragraph of the complaint must be read in isolation." Pet. App. A4. Charge One of the complaint specified five instances in which petitioner engaged in the practice of law without agency approval; these allegations provide particularity to the substance of Charge Two. *Id.* at A4-A5; cf. *United States* v. *Dischner*, 974 F.2d 1502, 1518 (9th Cir. 1992), cert. denied, 113 S. Ct. 1290 (1993) (criminal indictment must be "read as a whole" and "construed according to common sense").

Petitioner further maintains (Pet. 15) that documents demonstrating that he appeared on behalf of clients before the New York Workers' Compensation Board were improperly admitted because they were hearsay. The documents consisted of certified copies of two workers' compensation case files and were admitted as evidence of the dates of the proceedings and names of the participants, including petitioner. Pet. App. A7. Even if rules regarding hearsay governed in administrative proceedings, see *Richardson* v. *Perales*, 402 U.S. 389, 410 (1971) ("Hearsay * * * is thus admissible [in Social

Security hearings] up to the point of relevancy."), the documents in this case fell within the exception to the hearsay rule for records of the proceedings of a public agency. Fed. R. Evid. 803(8); *Yanopoulos* v. *Department of Navy*, 796 F.2d 468, 471 (Fed. Cir.), cert. denied, 479 U.S. 824 (1986) (although not binding, Federal Rules of Evidence are a "helpful guide" for MSPB evidentiary rulings).

Finally, petitioner sets forth (Pet. 15-16) a miscellany of "improper rulings" which he claims are "examples of lack of impartiality both by the trial judge and MSPB." The MSPB carefully considered and properly rejected petitioner's unfounded charge of bias. Pet. App. A16. Nothing in petitioner's list of complaints merits further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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